BEFORE THE FEDERAL MARITIME COMMISSION

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Petitions No. P3-03, P3-05, P3-06. P3-07, P3-08 and P3-09

SUPPLEMENTAL COMMENTS OF UNITED PARCEL SERVICE

Pursuant to the Commission's order entered November 13, 2003, Petitioner United Parcel Service, Inc. ("UPS") hereby responds to comments filed by various parties in response to its Petition for Exemption Pursuant to Section 16 of the Shipping Act of 1984 to Permit Negotiation, Entry and Performance of Service Contracts (the "UPS Petition"). UPS also comments on certain points raised in the petitions of other parties seeking various actions involving service contracts and tariffs, and responds to comments filed in response to those petitions.'

As UPS will demonstrate below, the Commission clearly has statutory authority under Section 16 of the Shipping Act of 1984 (the "Act") to grant UPS's petition for service contract authority. UPS has satisfied both of the statutory criteria for exemptions set forth in Section 16, as the exemption would "not result in substantial reduction in competition or be detrimental to commerce."

The comments filed in response to UPS's petition and those of other ocean transportation intermediaries ("OTIs") are overwhelmingly favorable. The handful of opposing comments do not state a proper legal basis for denial of the UPS Petition, The fact that shipper interests favor these petitions, and only competing vessel operating common carriers ("VOCCs") oppose them, demonstrates that extending service contract rights to UPS and other qualified non-vessel operating common carriers ("NVOCCs") would increase competiiion, rather than reduce it, and would plainly benefit commerce.

Of equal importance, UPS will show that the tariff publication relief sought by certain other OTIs, while helpful to themselves, and which UPS does not oppose, would not adequately address the service issues which UPS must overcome to fulfill shipper demands. In this regard, we note that in recent additional comments, the National Customs Brokers and Forwarders Association of America, Inc., which has sought such tariff publication relief for its members in

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[1] Other relevant petitions Include Petition No. P5-03 (filed by the National Customs Brokers and Freight Forwarders Association of America seeking tariff publication relief), Petition No. P7-03 (filed by Ocean World Lines, Inc. seeking revised interpretation of the "special contracts" rule), Petition No. P8-03 (filed by BAX Global, Inc. seeking a rulemaking with respect to establishment of standards for granting of service contract authority to certain NVOCCs) and Petition No. P9-03 (filed by C.H. Robinson International seeking a rulemaking regarding grant of service contract authority to NVOCCs).

Petition No. P5-03, agrees that qualified NVOCCs should have service contracting authority.'

I. The Commission Has Statutow Authoritv to Grant the UPS Petition

Several opponents argue that the Commission lacks statutory authority to confer service contract authority upon any OTI because during the process of legislating the Ocean Shipping Reform Act ("OSRA") in 1997-98, Congress considered this possibility but did not grant it, rejecting the "Gorton Amendment" which would have extended service contract authority to all classes of OTIs. Others contend that Section 16 can only be used with respect to Shipping Act matters "not yet addressed by Congress."

These arguments fail to confront the effect of the unambiguous language of Section 16, which states clearly that the Commission may grant an exemption from "any, requirement" of the Act, at any future time, without any limitation as to subject matter. Additionally, even if examination of the legislative history were legally permissible or appropriate to ascertain the meaning of Section 16 – which it is not – this history further supports the position of UPS and the other petitioners.

A. The Plain Language of Section 16 Confers Broad Authority on the Commission to Grant Exemptions Sought bv UPS and Others.

Section 16, in relevant part, provides that:

> The Commission, upon application or on its own motion, may by order or rule exempt for the future any class of agreements between persons subject to this chapter or any specified activity of those persons from any requirement of this chapter if it finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce.

46 U.S.C. App. § 1715 (2000).

On its face, Section 16 plainly permits the Commission to grant an exemption from "any *requirement*" of the Act, provided the two conditions set forth with respect to effects on competition and commerce are met. There is no suggestion of any limitation whatsoever on the Commission's authority. "[W]here a statute expressly enumerates the requirements on which it is to operate, additional requirements are not to be implied." Travco. Inc. v. United States, 994 F.2d 832, 836 (Fed. Cir. 1993) (citations omitted). If Congress had wanted to

[2] Joint Additional Comments of The National Industrial Transportation League, National Customs Brokers and Forwarders Association of America and Transportation Intermediaries Association, filed January 12, 2004 in Petitions Nos. P3-03 et al.

prevent the Commission from utilizing Section 18 to exempt any particular activity such as service contract authority under Section 18, it could have said so in the statute. It did not, and thus opponents' suggestion that any exception can be implied is simply wrong.

Words used in a statute are to be given their ordinary, common meaning. Williams v. Tavlor, 529 U.S. 420, 431, 120 S. Ct. 1479, 1488 (2000). AS the Supreme Court has acknowledged, "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind."' United States v. Gonzales, 520 U.S. 1, 5, 117 S. Ct. 1032, 1035 (1997) (citations omitted). In Gonzales, the Supreme Court concluded that the phrase, "any other term of imprisonment" used in a federal statute referred to "all 'term[s] of imprisonment,' including those imposed by state courts," where there was no language limiting the breadth of the word "any." Id. Similarly, here, there is no basis for the opponents' argument that "any requirement" should be interpreted narrowly to mean only "any requirement not previously addressed by Congress."

The mere suggestion that it is necessary to consider the legislative history of OSRA in an effort to limit Section 18 is flatly inconsistent with fundamental principles of statutory construction. Where a statute is clear and unambiguous on its face, it is improper to resort to legislative history to interpret, alter or add to its meaning. U.S. v. Oregon, 368 U.S. 843, 649 (1961); Tennessee Valley Authoritv v. Hill, 437 U.S. 153, 184-8, 98 S. Ct. 2279, 2297-8 (1978); U.S. v. Braxtonbrown-Smith, 278 F.3d 1348, 1352 (D.C. Cir. 2002) ("Where the language is clear, that is the end of the judicial inquiry."). Instead, the legislative intent "is to be derived from the language and structure of the statute itself, . . . not from the assertions of codifiers directly at odds with clear statutory language." United States v. Lanier, 520 US. 259, 287 n.6, 117 S. Ct. 1219, 1228 n.6 (1997). See also West Virainia Universitv Hospitals, Inc. v. Casey, 499 U.S. 83, 98-99, 111 S. Ct. 1138, 1147 (1991) (where statutory text "contains a phrase that is unambiguous[,] . , . we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.").[3] Further, there is a strong presumption against utilizing rejected amendments to interpret statutes, particularly, where (as is the case with Section 18) the statute in question is clear and unambiguous on its face. See U.S. v. Craft, 535 U.S. 274, 287, 122 S. Ct. 1414, 1425 (2002) ("... [Flailed legislative proposals are a 'particularly dangerous ground on which to rest an interpretation of a prior statute[,]'", quoting to Pension Benefit Guar. Corp. v. LTV Corp., 498 U.S. 833, 650, 110 S. Ct. 2888) (1990)). See also Solid Waste Aoencv of N. Cook Countv v. U.S. Armv Corps of Ena'rs, 531 U.S. 159, 169-70, 121 S. Ct. 675, 881 (2001) (asserting the same proposition).

[3] Notably, in light of opponents' stated concern about the intent of Congress, a very substantial number of Members of the House of Representatives and Senate have submitted comments supportive of the UPS petition.

Thus, the language of Section 16 does not preclude the Commission from granting an exemption on the basis that Congress at some previous time considered the same subject but chose at that time not to exclude it from regulation under the Act. If the Commission were not able to grant exemptions with respect to any matter previously considered by Congress, as the Fashion Accessories Shippers Association ("FASA") suggests[4], Section 16 would be rendered a nullity, because Congress can be presumed to have considered every requirement it has imposed through statute. Such a result would run contrary to well-established principles of statutory construction. See United States v. Menasche, 346 U.S. 528, 538-39, 75 S. Ct. 513, 520 (1955) (citations omitted) ("It is our duty 'to give effect, if possible, to every clause and word of a statute[.]'").

The Commission has not hesitated to grant exemptions to statutory requirements expressly considered and imposed by Congress. The Commission has relied on Section 16 to grant exemptions to the filing requirements for agreements between common carriers expressly set forth in Sections 5 and 6 of the Act. See, e.g., the Commission's regulations at 46 C.F.R. § 535 exempting numerous classes of agreements from this statutory filing requirement, Although the only class of such agreements which Congress exempted from the filing requirement in the Act itself are stock or asset acquisition agreements between or among ocean carriers[5], the Commission has invoked Section 16 to exempt non-substantive amendments to common carrier agreements (46 C.F.R. § 535.302), husbanding agreements between VOCCs (46 C.F.R. § 535.303) agency agreements between VOCCs (46 C.F.R. § 535.304), equipment interchange agreements between VOCCs (46 C.F.R. § 535.305), non-exclusive transshipment agreements between VOCCs (46 C.F.R. § 535.306) marine terminal agreements (46 C.F.R. § 535.307), agreements otherwise covered by Sections 4 and 5 of the Act between a parent company and its wholly-owned subsidiary (46 C.F.R. § 535.308), miscellaneous modifications of agreements (46 C.F.R. § 535.309), marine terminal services agreements (46 C.F.R. § 535.310), and marine terminals facilities agreements (46 C.F.R. § 535.31 1). In a currently pending proceeding (Docket No. 03-15), the Commission has also proposed to add a new exemption for agreements of various types among common carriers with combined market share of less than 20 percent. If the opponents' view on statutory authority were correct, each of the foregoing exemptions would be unlawful.

The Commission has also promulgated regulations exempting carriers from various statutory tariff publication requirements, including shipments of household goods and military cargo, and has exempted certain classes of traffic

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[4] Comments of Fashion Accessories Shippers Association, Inc., in Petition No. P3-03, August 21, 2003 ("FASA Comments").

[5] Sectlon 4(c) of the Act, 46 U.S.C. app. § 1703.

and tariff agreements, including interchange agreements, controlled carriers and terminal barge operators in "Pacific Slope" states. See 46 C.F.R. § 520,13(b). See also Household Goods Forwarders Ass'n of America, Inc., Petition for Exemption, 27 S.R.R. 277 (F.M.C. 1995). Other Commission regulations providing exemptions include 46 C.F.R. § 530.13(b), providing non-statutory exemptions for certain service contracts, and 46 C.F.R. § 565.8, providing exceptions to controlled carrier provisions of the Act. These exemptions would likewise be unlawful under the opponents' view of the Commission's statutory authority under Section 16.

The Commission has also granted exemptions from many other provisions of the Act that had previously been expressly adopted by Congress. See, e.g., Petition of China Ocean Shipping (Group) Company for a Limited Exemotion from Section 9(c) of the Shipping Act of 1964, No. PI-98, 1998 WL 309053 (F.M.C. March 27, 1998) (exempting petitioners from the Acts provision that controlled carriers' rate decreases could not be implemented until 30 days after their tariffs were amended); Petition of Hambura-Sudamerikanische Dampf-Schiffahrts-Gesellschaft Eggert & Amsinck for an Exemotion From the Notice Reauirement of 46 C.F.R. § 530.9, No. P4-99, 1999 WL 1294891 (F.M.C. Dec. 16, 1999) (exempting petitioner from notice and filing requirements imposed under regulations implementing the Act). The Commission has also relied on Section 16 in promulgating regulations that exempt certain common carrier and terminal agreements from the filing requirements of Sections 4 and 5 of the Act. See generally 46 C.F.R. § 535, Subpart C (providing for exemptions from filing requirements). See also Co-Loadina Practices bv NVOCCs, Docket No. 94-26 (1994), 1994 WL 1646090 (F.M.C.); Exemption of Certain Marine Terminal Arrangements, Docket No. 91-20, 26 S.R.R. 139, 143 (1992). These were clearly matters previously considered and expressly acted upon by Congress, and the Commission nevertheless found adequate authority in Section 16 to grant exemptions to filing requirements expressly imposed by Congress.

These and many other examples clearly show Section 16 has been used to grant relief from requirements of the Act expressly considered and imposed by Congress.

B. The Legislative History Supports the Commission's Authoritv to Grant the UPS Petition Under Section 16.

In light of the plain language of Section 16, the Commission need not consider the legislative history of OSRA or the Act in deciding the UPS Petition. However, even if the Commission were to look to this legislative history, its authority to grant the pending petitions remains clear.

In amending Section 16 in the course of adopting OSRA, Congress streamlined the exemption process to provide the Commission with even greater flexibility to enable it to react to evolving market circumstances. Whereas

previously a petitioner was required to meet four statutory tests before an exemption could be granted, OSRA eliminated two of those criteria.[6] This amendment is consistent with the manifest purpose of Section 16, which is to allow the Commission – as the federal agency most closely in touch with developments in the ocean transportation industry-to apply its special expertise to grant regulatory relief designed best to promote the public interest.

The Commission has since acted on this post-OSRA Section 16 broader authority in granting exemptions. See Order Grantina Limited Exemotion pursuant to Petition of A.P. Moller-Maersk Line For An Exemotion From Notice Reauirement of 46 C.F.R. § 530.9, No. P5-99, 1999 WL 1294890 (F.M.C. Dec. 16, 1999) (granting an exemption allowing for a single notice filing regarding name change to service contracts in connection with an asset acquisition). In granting this exemption, the Commission cited to Petition of China Ocean Shipping (Group) Companv for a Limited Exemption from Section 9(c) of the Shipping Act of 1984, No. PI-98, 1998 WL 309053 (F.M.C. March 27, 1998) (emphasis added) and stated that "OSRA's legislative history indicates an intent to grant the Commission *greater discretion* in granting exemptions under Section 18, in order that it might further implement Congress' general deregulatory goals (emphasis added)." See also Order Grantina Limited Exemotion Petition of Hambura-Sudamerikanische Dampf-Schiffahrts-Gesellschaft Eaaert & Amsinck For An Exemption From Notice Reauirement of 46 C.F.R. § 530.9, No. P4-99 1999 WL 1294891(F.M.C. Dec. 16, 1999) (granting an exemption for the filing of a single notice of name change to service contracts in connection with an asset acquisition and citing to Petition of China Ocean Shipping (Group) Companv for a Limited Exemotion from Section 9(c) of the Shipping Act of 1984, No. PI-98, 1998 WL 309053 (F.M.C. March 27, 1998)).

The Commission further reaffirmed its broadened authority under Section 16 by certain statements that it made in the Commission's Report on OSRA.[7] The Commission commented that an NVOCC's right to enter into service contracts in its carrier capacity is "peculiarly a legislative prerogative and is not a matter subject to administrative discretion." Commission Report at 48. The Commission immediately qualified this statement, however, in connection with an acknowledgement that some in the NVOCC community were contemplating petitioning the Commission for an exemption under Section 16 from the statutory tariff publication requirement. Importantly, the Commission did 'not declare that it would not have authority to hear such petition and grant an

[6] The pre-OSRA exemptlon test criteria "substantially impair effective regulation by the Commlssion, be unjustly dlscriminatory, result in a substantial reduction in competition, or be detrimental to commerce" was discarded in favor of "result in a substantial reduction in competition, or be detrimental to commerce". Pub. L. No. 105-258, 112 Stat. 1912 (Oct. 14, 1996).

[7] Federal Maritime Commission, *The Impact of the Ocean Shipping Reform Act of 1998 (2001)* ("Commission Report").

exemption. Rather, it simply explained that commenting on such a petition and the exemption sought was "premature". Commission Report at 48.

The Commission concluded by saying that it would continue to focus attention and resources on this topic in the future because the shipping industry as we know it now will continue to change, and within that context the Commission would continue to encourage a "free-market environment". Commission Report at 48. In view of the changes in the industry since 1998, granting the UPS Petition would further that goal; Section 16, with its streamlined exemption authority following OSRA, is the deregulatory tool (as envisioned by Congress) that the Commission can and should use to respond in a timely manner to such changes.

Some commenting parties suggest that the failure of the Gorton Amendment (which would have extended service contract authority to all OTIs, including large and small NVOCCs and forwarders) indicates a legislative intent to preclude even individually qualified NVOCCs from entering into service contracts, even if such contract authority would satisfy Section 16 criteria and increase competition in the shipping industry. In this regard, commenting parties such as FASA have referred to the legislative history of Senate Bill 414 as reported to the Senate Committee on Commerce, Science and Transportation Senate Report 105-61. FASA and others, however, do so outside of its proper historical context, For example, FASA fails to cite to the unqualified statement therein that "The bill [S. 414] broadens the authority of the FMC to provide statutory exemptions . . ." [S3308, Senator Breaux].

In addition, the arguments advanced by the opponents ignore the very nature of the Gorton Amendment. That Amendment raised only the issue of whether all NVOCCs should be authorized to enter into confidential service contracts. It did not consider whether some subset of qualified, domestic NVOCCs might be granted service contract authority under the Commission's broad discretionary power to grant exemptions under Section 16. The prevailing rationale for rejecting the Gorton amendment was that it would extend this practice to some undercapitalized OTIs not financially capable of performing such contracts. See remarks of Rep. Oberstar, 144 Cong. Rec. H7018 (daily ed. August 4, 1998). This concern does not apply to UPS or other current petitioners seeking service contract authority.

Accordingly, nothing in the legislative history negates the broad authority vested in the Commission to grant a Section 16 petition where "the exemption will not result in substantial reduction in competition or be detrimental to commerce." As set forth in Section II below, the UPS petition and other pending petitions clearly satisfy the Section 16 criteria.

C. Section 16 Clearly Authorizes "Affirmative" Relief.

Several opponents argue that Section 16 cannot be utilized to grant an "affirmative" exemption, i.e., one that permits an OTI to "do" something as opposed to an exemption to grant relief "from" some provision in the Act. See, e.g., World Shipping Council ("WSC") Comments, filed in Petition No. P3-03, October 10, 2003 ("WSC Comments"), p. 5-6. This contention arises from a highly strained reading of Section 16, and is quite simply a distinction without a difference. In fact, Section 16 has historically been invoked by the Commission to grant relief similar to that sought by UPS. In plain words, the "requirements" of the Act from which UPS seeks an exemption are the requirement in Section 8(c) that in order to utilize service contracts, a carrier must be a VOCC, and the requirement in Sections 8(a) and 10(a) and (b) (applicable in the absence of service contract authority) that it publish tariffs for all shipments and only carry cargo at tariff rates. It could not be more obvious that these fall within the meaning of "any requirement" of the Act, and thus may be the subject of an exemption granted by the Commission.[8]

The plain language of Section 16 clearly permits the type of exemption UPS has requested. It provides that the Commission may exempt "any specified activity . . . from any requirement . . .". 46 U.S.C. App. § 1715 (emphasis added). Several commenting parties have expressly acknowledged the requirement from which UPS hereby seeks relief – the tariff publication requirements set forth in Section 8(a) of the Act. WSC describes the Section 8(a) requirement and the rationale for it succinctly and accurately: "... NVOCCs must publish tariffs because NVOCCs want to be considered and want to present themselves to the marketplace as 'carriers' . . . In order to be accorded common carrier status, one must comply with the Shipping Acts common carrier obligations . . . Third party transportation enterprises that do not wish to be regulated as common carriers may and do operate as freight forwarders, and thereby avoid carrier obligations and regulation." WSC Comments, p. 3. Further, American President Lines ("APL") acknowledges in its comments the foregoing Section 8(a) requirement by colorfully stating that extending service contracting authority to NVOCCs would "... effectively neuter the Shipping Act regulatory regime governing NVOCCs which is grounded in the statutory tariff filing requirement."[9] Yet, contrary to such acknowledgments, opponents labor to characterize the UPS Petition as seeking an "affirmative exemption" or "affirmative privilege." Global Link Comments, p. 1; WSC Comments, p. 6.

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[8] Implicit in the UPS request for service contract authority is exemption from the requirements of Sections 8(a) and IO(b)(Z) of the Act that would otherwise apply in the absence of service contract rights.

[9] Comments of American President Lines Ltd., filed in Petition No. P3-03, October 10, 2003, p. 14-15.

Eased on the Act's statutory framework, including Sections 8(a) and 8(c), and the preceding commenting parties' own characterizations of Section 8 of the Act, it is clear that the UPS Petition squarely seeks relief from a 'requirement' of the Act as Section 16 contemplates.

II. UPS's Petition Satisfies the Two-Part Statutory Test, Because Service Contract Authority Would Improve Competition and Have a Beneficial Effect on Commerce

A. Increased Competition.

Section 16 provides that the Commission may grant an exemption provided the relief provided would not impair competition and would have a beneficial effect on commerce. Shippers and shipper interest groups, who would benefit from increased competition, support UPS's Petition." Likewise, the American Trucking Associations, Department of Justice and other parties keenly interested in competitive issues, support UPS." Opponents contend these conditions are not met, but in fact the very points they raise prove that such statutory tests have been satisfied.

FASA points out that UPS is a large, successful multimodal carrier and integrated logistics service provider that can do virtually everything in the industry except offer service contracts for ocean transportation to its shippers. FASA Comments, p. 4. FASA argues that allowing UPS to provide service contract benefits to its customers would enable it to increase its market share by securing additional business, presumably by offering services that are more attractive to shippers. It would seem obvious that the very thing about which FASA complains is in fact increased competition, which is exactly what the Section 16 exemption process is designed to foster.

In entering service contracts through FASA, FASA's member shippers obviously gain the benefits of market power arising from their combined shipping volume in dealing with VOCCs. However, it is impossible to fathom how FASA's members could possibly be competitively harmed if UPS or other OTIs likewise could enter service contracts with FASA or its members. UPS or other similar OTIs, with their own significant traffic volumes, could potentially offer equal or possibly even greater rate savings than those FASA itself can provide in some instances, as well as offer additional value-added integrated logistics services. Where its own member shippers would have more options for better, faster, cheaper and more comprehensive transportation and logistics services as a

[10] See, e.g., shipper comments and comments of the National Industrial Transportation League, October 10, 2003, filed in Petition No. P3-03.

[11] See comment of American Trucking Associations, Inc., filed in Petition No. P3-03, September 3, 2003, and Department of Justice comments filed in Petition No. P3-03 et al., October 15, 2003.

result of the granting of the UPS exemption, FASA should not be heard to suggest there is any impairment of competition.

In sharp contrast to FASA's position, the American Institute for Shippers' Associations, Inc. ("AISA"), the trade association for all shippers' associations, has commented favorably on the pending petitions. AISA correctly observes that the broader use of service contract authority would substantially increase competition among all classes of carriers, benefiting shippers' associations and their members.[12] AISA concludes that giving NVOCCs more contracting options, including confidential service contracting, would (i) give their associations and shippers more competitive options, with rates and services that are more competitive than some carriers are able or willing to offer to individual shippers' associations, (ii) assist such associations in direct contract negotiations with carriers, and (iii) create more creative and efficient contract rates and services with all shippers.[13]

Without offering any factual support, FASA alleges that if UPS were obtain to service contract authority, it would "dominate a large segment of the ocean cargo transportation industry," charge "discriminatory and unfair ocean cargo rates" and otherwise seek to violate Section 2 of the Sherman Act. FASA Comments, p. 2 and 5. These statements are obviously without merit. UPS presently handles some 300,000 TEUs of ocean freight annually. (See Petition No. P3-03, Verified Statement of Michael Gargaro ("Gargaro Statement"), p. 13) This Is significantly less than the one-time fleet lift capacity of any of the ten largest VOCCs operating in U.S. trades. (Id., Appendix C.) A market share of less than one percent hardly puts UPS in a position to corner the U.S. ocean transportation market or charge predatory prices. As UPS has stated in its petition, with service contract authority, UPS would be able to offer lower costs to shippers utilizing its integrated logistics and transportation services. It is difficult to see what could possibly be unjustly discriminatory or unfair about that. The idea behind OSRA and the Commission's exemption authority under Section 16 is that through well-considered deregulation, competitive efficiencies arising from innovative services can result in lower rates for shippers. If UPS does not offer shippers, including FASA and its members, a more advantageous price and service package, they will simply deal with UPS's competitors.

B. Beneficial Impact on Commerce.

It would also seem obvious that granting the UPS Petition would have a positive effect on commerce, measured in terms of benefits to shippers, Many shippers, ranging from multinational companies with large volumes of annual

[12] Consolidated Comments of The American Institute for Shippers' Associations Inc., filed January 9, 2004 in Petitions Nos. P3-03 et al. ("AISA Comments").

[13] AISA Comments, p. 4-6.

traffic ranging up to 25,000 annual TEUs[14] to smaller volume shippers with as few as six annual TEUs,[15] as well as organizations representing a broad range of manufacturers, importers and exporters, have filed comments in support of the UPS Petition. Notably, no shipper or shipper group (other than FASA, whose opposition contradicts its own shipper members' interests) has opposed the petition or raised any concerns about its economic impacts upon their businesses.

In view of the broad benefits associated with wider utilization of service contracts identified in the Commission's Report on OSRA, it would likewise seem obvious that opening this practice in a manner permitting more shippers, including those with smaller volumes, to take advantage of it can only result in benefits at all levels.

III. Tariff Publication Relief Alone Will Not Address UPS's Shippers' Needs

The VOCC opponents of UPS's petition argue that service contract authority is not necessarily needed, and that some form of tariff publication relief, such as "range rates," would effectively allow OTIs such as UPS to provide shippers with sufficient rate confidentiality to address their concerns. This is clearly not the case.

UPS's shippers require complex, customized packages of transportation and supply chain management services. Due to intense competitive factors in their own industries, they strongly desire full confidentiality for all components of these services, including the ocean freight portion. Tariff publication exemptions might solve that particular need and would benefit certain OTIs. However, there is much more where UPS and other large integrated logistics providers are concerned.

UPS's customers want "one stop shopping" in which they sign a single agreement with a single entity providing for the combined package of transportation and integrated logistic service which suits their service, priced competitively based on the exact nature of services to be provided from the UPS menu. UPS, in turn, needs the security of a longer-term contractual arrangement under which the shipper commits to a specific volume of cargo, in order to organize the proposed service with various VOCCs and subcontractors, and to obtain the pricing and space availability commitments it needs to price the overall service competitively. This is not possible merely by using tariffs and time volume rates. UPS must lock in contractual volume commitments in an

[14] See, e.g., comments of the Gap, October 9, 2003, Gillette, October 9, 2003, and Alcoa, October 10, 2003, in support of UPS Petition.

[15] @comments of Asiatix LLC, August 6, 2003, in support of UPS Petition.

enforceable agreement reflected in a single contract with the shipper. This is only realistically possible with service contract arrangements."

From the shipper side, the same is true. A service contract locks in all the elements of the relationship that a shipper needs to proceed with major commitments to its customers, which may involve investments such as construction of distribution centers or other facilities, contracting for long-term higher-volume supply agreements with upstream vendors and many other steps which would be very risky in the absence of a service contract. Allowing UPS to provide that contractual comfort will benefit shippers greatly, as shown by the numerous supporting comments from UPS's shippers, large and small."

As the Commission is aware from its studies, service contract transactions represented such an enormous commercial improvement over tariffs as a means for pricing ocean freight services that within only a year or two of the enactment of the OSRA changes, virtually 100 percent of traffic moving on major routes was being fixed through this mechanism." Major VOCCs have benefited greatly from the advent of service contracts. They realize the advantages service contracts provide to carriers; this is why they sought service contract authority in OSRA, instead of just asking for tariff publication relief. This advantage is obviously the reason they so vigorously oppose extending the practice to NVOCCs such as UPS.

Some opponents seek to deflect this significant shipper and NVOCC need for service contracting, alleging that virtually the same results can be obtained through a process of having the NVOCC and shipper enter a comprehensive logistics services contract, coupled with an arrangement where the shipper, or the NVOCC as the agent for the shipper, would separately enter service contracts with VOCCs for the trade in question, While there may be a few specific instances where this practice would work, it does not respond to the prevailing market demand. In particular, this approach fails to satisfy the true "one stop shopping" demands of shippers when dealing with NVOCC logistics providers. Further, by negotiating with the VOCC for a service contract only with respect to the particular volume of one shipper, as opposed to fitting the shippers' volume into the overall service volume of the NVOCC, the ocean freight rate is likely not to be very competitive. Additionally, by not being the "carrier" for the shipper's traffic, the NVOCC logistics provider cannot fully bring into play its own system and technology for processing the bill of lading and other documents, and would have difficulty providing many of the key service features shippers always demand, such as monitoring of cargo location, management and

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[16] Gargero Statement, p. 20-23.

[17] Comments submitted by many UPS shippers, ranging in annual volumes from 25,000 TEUs down to seven TEUs, confirm that service contracts would fulfill an important commercial need.

[18] Commission Report, p. 17.

consolidation of shipments. The net result is that the cost would be higher and the services provided would be far less than the best possible package. UPS did not get to where it is today just by providing "pretty good" service. Service contracts enable a carrier to provide superior service, and UPS wants to make the advantages of this contract mechanism available to its shippers.

IV. NVOCCs Converting to VOCCs Is Not a Sensible Alternative

Several commenting parties propose that the simple solution to UPS's desire to have service contract authority would be for it to acquire a vessel and become a VOCC. (See APL Comments, p. 5.) Relying upon the Commission's opinion in Docket 99-10 and other traditional interpretations of the "common carrier" definition in the Act, these parties suggest that if UPS operated a single vessel somewhere, it would qualify as a VOCC for all trades worldwide.

This proposal suggests an artificial fix and does not address the underlying issues. Without commenting on the merits of this proposal, UPS suggests that it is far more sensible for the Commission, and the industry, to confront the regulatory issue of service contract authority head-on with a thoughtful regulatory solution, as Congress intended.

V. Rulemakina Criteria

For rulemaking purposes, UPS believes criteria for determining which NVOCCs and contracts would be generally exempted by the Commission should be non-discriminatory and flexible, and should identify a specific class of NVOCC logistics service providers qualified for such contracting authority. While UPS believes the criteria suggested by BAX Petition No. P8-03 and others are a reasonable point to begin, UPS also believes overly-rigid financial criteria should be avoided. Competition and commerce will be best served by standards that encourage innovative new entrants into the market.

UPS suggests the following as a potential framework for a rule authorizing qualified NVOCCs to enter a form of contract with shippers that would satisfy the growing demand in this industry:

A. Qualified NVOCCs ("Providers") would be permitted to enter "Logistics Contracts" with shipper customers providing for transportation and related services, with ocean freight rates to be pursuant to special tariffs that would be exempt from publication.

B. The full terms of "Logistics Contracts" utilizing such exempt ocean rates would be filed with the FMC, and portions thereof analogous to the essential terms of service contracts would be published (i.e., commodities covered, duration, volume minimum and trade route).

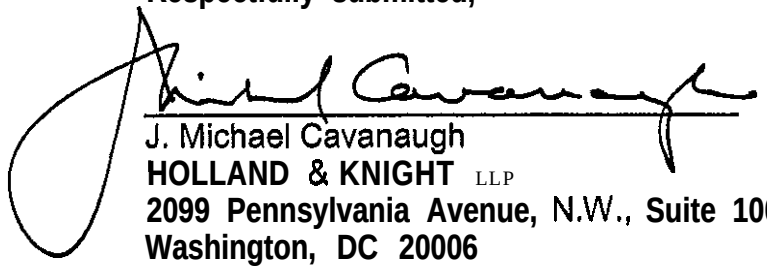
C. "Logistics Contracts" would be (i) confidential (except for published essential terms), (ii) include a contractually-enforceable minimum volume commitment, (iii) have liquidated damages for failure to meet the volume commitment, and (iv) be amendable in the same manner as service contracts.

D. In order to qualify for the purposes of entering Logistics Contracts, a "Provider" must (i) hold itself out as offering logistics and intermodal transportation services, through its own facilities (either owned or under long-term lease) and facilities of affiliates under significant common ownership and control, at both U.S. and overseas locations, (ii) hold itself out to provide transportation for shippers' cargo in other modes, and (iii) have the ability to perform its contractual commitments, as evidenced by financial bonding or other performance criteria acceptable to the Commission in its expertise and discretion, which may take into account factors including the Provider's credit rating, public trading status, affiliation with a VOCC, any prior Shipping Act violations history, and other indicators of stability and reliability.

VI. Conclusion

For the reasons stated in the UPS Petition, the Commission, acting under Section 16, should grant an exemption permitting UPS to have service contract authority.

Respectfully submitted,



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January 162004